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## POSTAL TELEGRAPH-CABLE CO. V. UMSTADTER.

*Supreme Court of Appeals of Virginia.*

March 16, 1905.

[50 S. E. 259.]

TELEGRAPHS—STATUTE IMPOSING PENALTY—FAILURE TO TRANSMIT MESSAGE—  
INTERSTATE COMMERCE—CONSTITUTIONALITY OF STATUTE—APPEAL—RE-  
VIEW ON MERITS.

1. The provision of Code 1887, sec. 1291, imposing a penalty on a telegraph company for failure to transmit a message is not violative of Const. U. S. art. 1, sec. 8, authorizing Congress to regulate commerce among the states, though applicable to a telegram to another state.
2. By the express provisions of Const. sec. 88 [Va. Code 1904, p. ccxxx], where the jurisdiction of the Supreme Court of Appeals depends solely on the fact that the constitutionality of a law is involved, the court has no jurisdiction to decide the case on the merits unless the contention of the appellant on the constitutional question is sustained.

[ED. NOTE.—For cases in point, see vol. 10, Cent. Dig. Commerce, secs. 22, 87.]

Error to Law and Chancery Court of City of Norfolk.

Action by J. M. Umbstadter against the Postal Telegraph-Cable Company. Judgment in favor of plaintiff, and defendant brings error.

*Affirmed.*

*Cabell & Sebrell*, for plaintiff in error.

*A. B. Seldner*, for defendant in error.

BUCHANAN, J.

The defendant in error, J. M. Umbstadter, recovered a judgment in the court of law and chancery of the city of Norfolk against the plaintiff in error, Postal Telegraph-Cable Company, for \$100, the penalty imposed by section 1291 of the Code of 1887 for failure to transmit a message. To that judgment this writ of error was awarded.

The facts of the case, briefly stated, are that the defendant in error, at Norfolk, Va., delivered to a messenger boy of the telegraph company, upon one of its blank forms, containing the usual conditions, a message to be transmitted from that city to a person in the state of New York, paying the proper charges thereon, which was never transmitted.

The first error assigned is that the judgment is erroneous because the statute which imposed the penalty, so far as it applies to interstate messages, is in violation of article 1, sec. 8, of the Constitution of the United States, which authorizes Congress "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

It is settled law that a telegraph line is an instrument of commerce, and that telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate business. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Postal Tel. etc. Co. v. City of Richmond*, 99 Va. 102, 37 S. E. 789.

It is also settled that, whatever authority a state may possess over the transmission and delivery of messages by telegraph companies, it does not extend to the delivery of messages in other states. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

But in the case of *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, it was held that a statute of the state of Georgia imposing a penalty upon a telegraph company for failure to deliver impartially, in good faith, and with due diligence, a message sent from another state to a person in Georgia, was a valid exercise of the police power of the state, and not in violation of the commerce clause of the federal Constitution. In discussing the question whether or not the statute involved in that case was valid, Mr. Justice Peckham, who delivered the opinion of the court, said, among other things, that: "In one sense it (the statute) affects the transmission of interstate messages, because such transmission is not completed until the message is delivered to the person to whom it is addressed, or reasonable diligence employed to deliver it. But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states. It would not unfavorably affect or embarrass it in the course of its employment, and hence, until Congress speaks upon the subject, it would seem that such a statute must be valid. It is the duty of a telegraph company which receives a message for transmission

directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor.

“The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing a general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith, and with due diligence, is not an addition to the duty which it would owe in the absence of such statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce, within the meaning of that clause of the federal Constitution under discussion? We think not. No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several states by holding that in regard to such a message as the one in question, although it comes from a place without the state, it is yet under the jurisdiction of the state where it is to be delivered (after its arrival therein at the place of delivery), at least so far as the legislation of the state tends to enforce the performance of the duty owed by the company under the general law. So long as Congress is silent upon the subject, we think it is within the power of the state government to enact legislation of the nature of the Georgia statute. It is not a case where the silence of Congress is equivalent to an express enactment. . . . In the case at bar there is no tax laid upon the messages, and no obstruction is placed in the way of the company in regard to the performance of any duty owed by it in connection with them. Instead of obstructing, this statute aids, commerce. The subject of the act is not national in its character, nor is uniformity at all requisite. Conduct which might incur the penalty of \$100 in one state might violate no statute in another,

and in still a third might subject the carrier to a penalty of but \$50; and yet there would exist no reason for uniformity of rule governing the subject, and the carrier would really suffer nothing from its absence.

“Nor is the statute open to the same objections that were regarded as fatal in *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187. No attempt is here made to enforce the provisions of the state statute beyond the limits of the state, and no other state could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the state of Georgia. No confusion, therefore, could be expected in carrying out within the limits of that state the provisions of the statute. It is true, it provides for a penalty for a violation of its terms, and permits a recovery of the amount, irrespective of the question whether any actual damages have been sustained by the individual who brings the suit; but that is only a matter in aid of the performance of the general duty owed by the company. It is not a regulation of commerce, but a provision which only incidentally affects it.”

We have quoted thus fully from the opinion of the court in that case because it is the latest expression of opinion of that court as to the extent of the police power of the states in reference to interstate messages, and by the principles there enumerated we are to be governed in the decision of the question now under consideration. In that case the default of the telegraph company occurred wholly in the state of Georgia. In this case the whole default took place in this state. In the one case it was a failure to deliver in a reasonable time after the message had reached the station to which it was destined; in the other, it was a failure to transmit at all from the point of origin. It may be that that portion of the statute under consideration, in so far as it provides that messages shall, with certain exceptions, be transmitted in the order of delivery, is an attempt to regulate commerce, and to that extent may be invalid; but this is not a proceeding for a failure to transmit the message in the order of its delivery to the telegraph company, for which a penalty is also provided, but it is for a total failure to transmit and is covered by that provision of the statute which imposes a fine for every failure to transmit faithfully and impartially. The

provision of the statute under which the penalty was imposed in this case was therefore for the purpose of enforcing the general duty of the telegraph company, which it owed to all persons in this state. "The direction," said the Supreme Court in *Western Union Tel. Co. v. James, supra*, "that the delivery of the message shall be made with impartiality and in good faith, and with due diligence, is not an addition to the duty which it owed in the absence of such a statute." Neither is the direction of our statute that a message shall be transmitted faithfully and impartially an addition to the duty which the telegraph company owed in the absence of such provision, for it is as much the general duty of a telegraph company faithfully and impartially to transmit a message as it is to deliver it after it has reached its destination; and a provision which imposes a penalty for a violation of the general duty to transmit is no more a regulation of interstate commerce, it seems to us, than a statute which imposes a penalty for a failure to deliver. The provision in question in the Virginia statute can, as was said of the provision in the Georgia statute, "be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states. It would not unfavorably affect or embarrass it in the course of its employment, and hence, until Congress speaks upon the subject, it would seem that such a statute must be valid."

The provisions of the Virginia statute involved in this case seems to us to be within the reasoning and the spirit of the decision in the *James Case*, and is no more a regulation of or obstruction to interstate commerce than was the provision of the Georgia statute which was upheld in that case. While the requirement that telegraph companies shall transmit messages faithfully and impartially, under a penalty, may incidentally affect, it is an aid to commerce, and stimulates such companies to discharge the duty which the general law has imposed upon them.

"It cannot be doubted," says Judge Cooley in his work on Constitutional Limitations (6th Ed.) p. 715—and his statement is quoted with approval by the Supreme Court of the United States in *Lake Shore etc. R. Co. v. Ohio etc.* 173 U. S. 285, 297, 19 Sup. Ct. 465, 470, 43 L. Ed. 702—"that there is ample power in the legislative department of the state to adopt all necessary legislation

for the purpose of enforcing the obligations of railway companies, as carriers of persons and goods, to accommodate the public impartially, and to make any reasonable provision for carrying with safety and expedition."

The same power must exist as to telegraph companies, for they exercise a public employment, and are bound to serve all customers alike, without discrimination. *Primrose v. W. U. Tel. Co.*, 154 U. S. 14, 14 Sup. Ct. 1098, 38 L. Ed. 883.

We are of opinion, therefore, that the provision of section 1291 of the Code of 1887 imposing a penalty upon a telegraph company for failing to transmit a message faithfully and impartially is not in violation of the commerce clause of the federal Constitution.

By section 88 of the Constitution of this state (Code 1904, p. ccxxx), which prescribes the jurisdiction of this court, it is provided that "in no case where the jurisdiction of the court depends solely upon the fact that the constitutionality of a law is involved, shall the court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained."

As our jurisdiction in this case depends solely upon the constitutional question involved, and we have decided that question against the contention of the plaintiff in error, we have no jurisdiction to pass upon the merits of the case, and do not wish to be understood, in anything that has been said in this opinion, as intimating any opinion on any other question raised or argued in the case.

The judgment of the court of law and chancery must be affirmed.

CARDWELL, J., absent.

NOTE.—For editorial on telegraph penalty statutes, see 10 Va. Law Reg. 1025.